

CATHERINE M. CORFEE SBN 155064
CORFEE STONE & ASSOCIATES
P.O. Box 1098
Carmichael, CA 95609
Telephone: (916) 487-5441
Facsimile: (916) 487-5440

ATTORNEYS FOR DEFENDANT
Keet Nerhan

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

PATRICK CONNALLY,

Plaintiff,

vs.

RINO FAIRFAX GAS; KEET NEHRAN; and
AZUCENA FERRARO and GIAN CARLO
FERRARO, individuals dba FERRARO
FAIRFAX SERVICE,

Defendants.

) Case No.: 3:15-cv-00601-JD
)

) **DEFENDANT KEET NERHAN'S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **OPPOSITION TO MOTION FOR**
) **SUBSTITUTION OF PLAINTIFF**

I. LAW AND ARGUMENT

The Court should deny Plaintiff's motion to substitute because the only basis for federal jurisdiction over this case, is the American's With Disabilities Act claim, which is now extinguished by virtue of the death of the Plaintiff. FRCP 25(a)(1) states: "If a party dies and the claim is not extinguished, the court may order substitution of the proper party." This Court has jurisdiction over this matter solely due to the federal ADA claim. All of Plaintiff's state claims are before the Court solely because of pendant jurisdiction. Now that Plaintiff has died, the ADA claim is extinguished due to the fact that the ADA provides only injunctive relief, i.e., an order to repair the property, to the Plaintiff.

1 Plaintiff's death means that his ADA claims are now moot. Title III of the Americans
 2 With Disabilities Act prohibits public accommodations from discriminating against disabled
 3 individuals "on the basis of disability in the full and equal enjoyment of goods, services,
 4 facilities, privileges, advantages, or accommodations..." 42 U.S.C. § 12182. The remedies for
 5 public accommodation violations are contained in 42 U.S.C. §§ 12188(a)(1)-(2), which refers to
 6 42 U.S.C. § 2000a-3(a). A disabled plaintiff may seek only injunctive and declaratory relief.
 7 42 U.S.C. § 12188. Monetary damages are not available under the ADA in connection with
 8 private suits. *"Injunctive relief is the sole remedy available to private parties under the*
 9 *Disabilities Act; it does not authorize a claim for money damages."* Antoninetti v. Chipotle
 10 Mexican Grill, Inc., 643 F.3d 1165, 1174 (9th Cir. 2012), emphasis added.

11 Since Plaintiff has died, his claims for injunctive relief under the ADA (and under state
 12 law, for that matter) are now moot. This is because the remedy of injunctive relief is available
 13 to a Plaintiff so that the property will be accessible once he returns to the property. Here, the
 14 Plaintiff will not be returning.

15 A federal court has judicial power to determine ADA claims for injunctive relief where
 16 there is a live case or controversy. U.S. Const. Art. III, § 2; Doe v. Madison School District No.
 17 321, et al., 177 F.3d 789, 797 (9th Cir. 1999); Dufrense, at 954. "A party must maintain a live
 18 controversy through all stages of the litigation process." Madison, at 797-798. "If an action or
 19 claim loses its character as a live controversy, then the action or claim becomes "moot" and we
 20 [the Court] lack jurisdiction to resolve the underlying dispute." *Id.* at 798 (citations omitted). A
 21 claim for injunctive relief is moot if "subsequent events made it absolutely clear that the
 22 allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, at
 23 190. The burden of persuading the Court lies with the party asserting mootness. *Id.*; Pickern v.
 24 Best Western Timber Cove Lodge, & Marina Resort, 194 F.Supp.2d 1128, 1130 (E.D.Cal.
 25 2002); Wander v. Kaus, 304 F.3d 856, 857 (9th Cir. 2002).

26 An action under the ADA may be dismissed as moot where the claimed injunctive relief
 27 fails to present a live case or controversy. Friends of the Earth, Inc. v. Laidlaw Environmental
 28 Services, 528 U. S. 189, 190 (2000); Dufrense v. Veneman, 114 F.3d 952, 954 (9th Cir. 1997)

(Action by California residents under ADA to enjoin state and federal officials from aerial pesticide spraying that allegedly exacerbated residents' chronic fatigue syndrome, was rendered moot by apparent eradication of the Mediterranean fruit fly and the fact that the Department of Agriculture had no plans in the foreseeable future for additional spraying to combat the Medfly; speculation that there might be future spraying did not preserve claim as a live case or controversy).

The Courts consistently hold that when a plaintiff is seeking only injunctive relief, the case becomes moot upon the death of the plaintiff. In Immel v. Lumpkin, 408 Fed.Appx. 921 (6th Cir. 2010), the Court stated: “Immel sought only declaratory and injunctive relief regarding her eligibility for Medicaid, and, therefore, upon her death, she no longer has a legally cognizable interest in the outcome. United States v. City of Detroit, 401 F.3d 448, 450 (6th Cir. 2005) (internal quotation marks omitted); see also Bowman v. Corr. Corp. of Am., 350 F.3d 537, 550 (6th Cir. 2003) (“Given the fact that [the prisoner] is dead, any claim for injunctive relief is moot”); Allen v. Mansour, 928 F.2d 404, 1991 WL 37832, at *1 (6th Cir. 1991) (unpublished table decision) (“Mootness applies also to situations where . . . the plaintiff seeks a declaratory judgment invalidating or modifying a state policy, since death prevents the plaintiff from benefiting in any way from the requested relief.”). Immel v. Lumpkin, 408 Fed.Appx. 921-922 (6th Cir. 2010).

Because Plaintiff’s ADA claim is now moot, the Court must decide if it will retain pendant jurisdiction over Plaintiff’s state claims. Under 28 U.S.C. 1367(a), “in any civil action of which the district courts have original jurisdiction, the districts courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. 1367(a). Under 28 U.S.C. 1367(c)(3), District Courts may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction. See Acri v. Varian Associates, Inc., 114 F.3d 999, 1000 (9th Cir. 1997). Factors courts consider in deciding whether to dismiss supplemental state claims include economy, convenience, fairness, and comity. *Id.* at 1001; Pickern v.

1 Holiday Foods, Inc., 293 F.3d 1133, 1133 (9th Cir. 2002). Primary responsibility for developing
2 and applying state law rests with the state courts. “In the usual case in which federal law claims
3 are eliminated before trial, the balance of factors ... will point toward declining to exercise
4 jurisdiction over the remaining state law claims.” Pickern, at 1130.

5 Other circuits have held that a court may retain jurisdiction over state law claims only if
6 extraordinary or unusual circumstances justify their retention. Wentzka v. Gellman, 991 F.2d
7 423, 425 (7th Cir. 1993); Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1255
8 (6th Cir. 1996). In Pickern v. Holiday Foods, Inc., 293 F.3d 1133, 1133 (9th Cir. 2002), which
9 was an ADA case in this District Court, Judge Shubb declined supplemental jurisdiction
10 because the plaintiff made no showing of extraordinary or unusual circumstances and having to
11 re-file an action in state court is not such an inconvenience that deserved an exercise of
12 supplemental jurisdiction. Pickern, at 1133.

13 The principle of comity to the states also supports a refusal by this Court to exercise
14 supplemental jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349-50 (1988).
15 The exercise of supplemental jurisdiction may be declined where a federal court’s determination
16 of state-law claims could conflict with the principle of comity to the states. Federal courts may
17 decline to exercise supplemental jurisdiction over claims (1) if the claim raises a novel or
18 complex issue of state law, (2) if the claim substantially predominates over the claim or claims
19 over which the district court has original jurisdiction, (3) the District Court has dismissed all
20 claims over which it had original jurisdiction, or (4) there are other compelling reasons for
21 declining jurisdiction. 28 U.S.C. § 1367(c). There are compelling reasons for declining
22 supplemental jurisdiction over Plaintiff’s state law claims which seek remedies that Congress
23 clearly intended to preclude under the ADA. Molski v. Mandarin Touch Restaurant, 359
24 F.Supp.2d 924, 936 (C.D.Cal., 2005) (overruled on other grounds).

25 Other than the ADA, all of Plaintiff’s claims are state law claims. Such was one of the
26 reasons cited by the Molski court in declining to exercise supplemental jurisdiction over the
27 plaintiff’s state law claims. Molski, at 936. Therefore, for the reasons stated above, this Court
28 should decline to exercise supplemental jurisdiction over Plaintiff’s state claims. It is also

1 important to note that not much had occurred in this case to date. Other than exchanging Initial
2 Disclosures, neither party had conducted any discovery. Other than this motion, there have
3 been no other motions. In short, this case is at its earliest stages, and is therefore ripe to be
4 refiled in state court, where it now belongs.

5 **II. CONCLUSION**

6 Due to the foregoing, Defendant respectfully requests that the Court deny Plaintiff's
7 motion to substitute because the ADA claim is now undeniably extinguished. Defendants
8 further request that the Court decline to exercise jurisdiction over Plaintiff's remaining state
9 claims, and dismiss the case.

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11 Dated: April 28, 2016

CORFEE STONE & ASSOCIATES

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13 /s/ Catherine M. Corfee

14 Catherine Corfee

15 Attorney for Defendant Keet Nerhan
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